

(8) Trainee Handout

TRAINING FOR VSO LESSON EIGHT MEDICAL RECORDS (VA AND NON-VA RECORDS)

PREREQUISITE TRAINING Prior to this training, the participants must have completed the lesson on the *Development Process*.

LEARNING OBJECTIVES The learning objectives of this lesson are to inform the trainee of the different types and sources of medical evidence, and what is needed when requesting this evidence.

At the completion of this lesson, the participant will be able to:

- Identify the categories of VA and Federal medical evidence.
- Identify the various sources of medical records outside the VHA.
- Identify the Service Officer's role in obtaining medical records.

TIME REQUIRED 1 hour

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REFERENCES

38 CFR 3.159 Department of Veterans Affairs assistance in developing claims.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Competent medical evidence* means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) *Competent lay evidence* means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) *Substantially complete application* means an application containing the claimant's name; his or her relationship to the veteran, if applicable; sufficient service information for VA to verify the claimed service, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant's signature; and in claims for non-service-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.

(4) For purposes of paragraph (c)(4)(i) of this section, *event* means one or more incidents associated with places, types, and circumstances of service giving rise to disability.

(5) *Information* means non-evidentiary facts, such as the claimant's Social Security number or address; the name and military unit of a person who served with the veteran; or the name and address of a medical care provider who may have evidence pertinent to the claim.

(b) *VA's duty to notify claimants of necessary information or evidence.*

(1) When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim. VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. VA will also request that the claimant provide any evidence in the claimant's possession that pertains to the claim. If VA does not receive the necessary information and evidence requested from the claimant within one year of the date of the notice, VA cannot pay or provide any benefits based on that application. If the claimant has not responded to the request within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, however, and the claimant subsequently provides the

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information and evidence within one year of the date of the request, VA must re-adjudicate the claim. (Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information. (Authority: 38 U.S.C. 5102(b), 5103A(3))

(c) *VA's duty to assist claimants in obtaining evidence.* Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. In addition, VA will give the assistance described in paragraphs (c)(1), (c)(2), and (c)(3) to an individual attempting to reopen a finally decided claim. VA will not pay any fees charged by a custodian to provide records requested.

(1) *Obtaining records not in the custody of a Federal department or agency.* VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records. (Authority: 38 U.S.C. 5103A(b))

(2) *Obtaining records in the custody of a Federal department or agency.* VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough

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information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records. (Authority: 38 U.S.C. 5103A(b))

(3) *Obtaining records in compensation claims.* In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. (Authority: 38 U.S.C. 5103A(c))

(d) *Circumstances where VA will refrain from or discontinue providing assistance.* VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently incredible or clearly lack merit; and

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law. (Authority: 38 U.S.C. 5103A(a)(2))

(e) *Duty to notify claimant of inability to obtain records.*

(1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

(i) The identity of the records VA was unable to obtain;

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- (ii) An explanation of the efforts VA made to obtain the records;
 - (iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and
 - (iv) A notice that the claimant is ultimately responsible for providing the evidence.
- (2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA. (Authority: 38 U.S.C. 5103A(b)(2))
- (f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any. (Authority: 38 U.S.C. 5102(b), 5103(a))

VA and FEDERAL MEDICAL EVIDENCE

VBA employees request medical evidence.

As we covered in the lesson on “Introduction to Development”, and as reflected in 38 CFR 3.159, the VA is required to obtain all Federal records we are aware of that could be used in deciding a claim. VBA employees use Compensation and Pension Record Interchange (CAPRI) to access veterans’ records electronically. If a medical facility is not “ON LINE”, the request must be made by a VA Form 10-7131. This system allows us to go into the VA Medical Centers electronic patient care records and extract the records we need. The records are downloaded and printed and placed in the veteran’s claims file. VBA does not have a way to store those records electronically. The system allows us to access patient care records from outpatient care or hospital in-patient care, including lab reports and X-ray reports.

In order for us to obtain these records, we must know where and when the veteran received treatment through the VA. There is no presumption that because a veteran lives in the catchment area for a VA Medical Center that he/she received treatment there, and we are not obliged to look for records we are not aware of.

Categories of VA medical evidence are:

- Inpatient hospital summaries
- Other inpatient information such as admission diagnosis
- Outpatient treatment records including appointment dates and clinic visits
- 21 Day Certificates
- Reports of tests and X-rays

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- Admission and discharge dates
- Demographic information including address, Social Security number, date of birth, number of absence days, etc.
- Value of estate
- Admission reports
- Competency reports

NOTE: Requests for records from Veteran Centers are required to be made by a letter from the VBA with an authorization from the veteran attached (VA Form 21-4142). If the veteran received treatment through a private physician under VA contract, it is not likely that the record of that treatment would be in the veteran's electronic record at the VA Medical Center. It would more likely be a paper record as we do not give contract physicians access to the electronic record. Such a record should be treated as a private physician treatment record for the purposes of evidence in a VA claim.

In addition to the VA medical records, we are obliged to obtain relevant records we are aware of that are held by other Federal agencies. These would include:

- Social Security Administration
- United States Public Health Service
- Military medical facilities (Note: If the veteran received health care from a private source through Tricare, we would treat those as private treatment reports.)

For all of these records held by a federal agency, we have an obligation to obtain the records and add them to the veteran's record. As is shown in 38 CFR 3.159c(2) above, we must continue to pursue those records until we have an indication that the records do not exist or further attempts to get the records would be futile. Service Officers should not request records from government agencies. It is the responsibility of the VA and requests from other sources result in delays as the agency tries to process multiple requests. You can best assist the veteran by clearly identifying the location of the records and dates of treatment. If you have copies of the records in hand as you submit the claim, it is OK to send them in, but understand that the way the law is written we are still required to request the very same records you just gave us.

An authorization from the claimant/veteran is generally not required to obtain records from other government agencies. *Exception to the rule is clinical information from:*

- United States Public Health Service
- Department of Health and Human Resources (if hospitalized as a civilian)

Any communication over the patient's signature authorizing release of information is sufficient to request that record.

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NON-FEDERAL MEDICAL EVIDENCE

There are often records of treatment that are relevant to a veteran's claim that occur as a result of treatment through non-VA sources. Some of the sources are:

- Local and state agencies (jails, prisons, city health clinics)
- Private Physicians
- Private Hospitals
- Clinics
- Health Maintenance Organizations (HMOs)
- Nursing Homes
- Coroner's reports
- Lay statements
- Employers
- Other

Although records of this type are not covered under Federal Privacy Act laws, they are covered under the Health Insurance Protection and Accountability Act (HIPAA). Any doctor who holds these records will not release them without a HIPAA compliant release statement signed by the person to whom the records pertain. The VA has modified VA Form 21-4142, *Authorization and Consent to Release Information to the VA* to make it HIPAA compliant. The reverse side of the form, just above the signature block, includes the HIPAA compliant language. If your office does not have the HIPAA compliant version of the VA Form 21-4142, don't use them. Throw away the old forms and request the new ones. We will not send the old form to the physician; we will send a new form to the veteran for completion.

We cannot compel any private source to release records to us. They are not required under the law to do so and we are authorized to issue subpoenas in routine claims issues. The VA has a *duty to assist* the claimant in obtaining evidence to substantiate his/her claim before making a decision on the claim. The **claimant** has ultimate responsibility to insure that non-Federal medical evidence is in the record at the time of the decision. The VA will make reasonable efforts to obtain non-Federal records identified by the claimant, if the claimant provides a release acceptable to records holder and adequately identifies the records. A "reasonable effort" means an initial request and at least one follow up request.

When requesting records from non-Federal sources, the VA allows 60 days for a response to the initial request, and allows 30 days for a response to the follow-up request. At the time of the follow-up request the claimant will be notified that the VA was unable to obtain the evidence, what efforts were made to obtain these records and describe any further action the VA will take with respect to the claim including processing the claim based on the evidence of record. That means, a decision on the claim will be made

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without the evidence, if that is the case. When 30 days has expired from the date of our follow-up request, we will proceed to a decision whether or not the evidence has been received.

The law gives the claimant one year from our initial notification that they have the right to submit evidence they want us to consider, to furnish that evidence. We can proceed to the decision before the year expires, after all the evidence has been received or the time limits discussed above have expired. If the claimant sends in evidence after the decision has been made but before the year's time limit passed, we will make a new decision incorporating the new evidence.

THE SERVICE OFFICER'S ROLE IN OBTAINING MEDICAL RECORDS FOR VA CLAIMS

In a typical scenario, the veteran will come to you seeking either an increase in his/her compensation benefits or to claim an additional benefits. In these cases, the key evidence will usually be some sort of medical evidence that shows treatment for the claimed condition. In your interview with the veteran, you are going to want to know where the evidence is and what it shows. In a perfect world, the claimant would have the evidence in hand and you could review with him/her. Alternatively, you can ask the client to get the evidence and bring it to you. In any case, your obligation to the client is to:

- Identify the evidence the veteran needs to have considered in his/her claim.
- Get the full name and address of the source of these records
- Have the veteran sign a release form sufficient to have those records released to the VA.
- Include information (dates and places of treatment including the address in non-VA sources) of any Federal records the veteran knows about that are relevant to the claim.
- Impress upon the client that they are ultimately responsible for furnishing any non-Federal records in connection with their claim.

The goal in any claim is to get the information in front of the decision-maker you want considered to give the desired outcome. The VA will only consider the evidence they are aware of and can obtain. Any effort you can make to assist in this effort will help your client and the decision-maker.